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2 PUBLIC UTILITIES COMMISSION

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7 RE: DT 10-137
NORTHERN NEW ENGLAND TELEPHONE
8 OPERATIONS, LLC d/b/a FAIRPOINT
COMMUNICATIONS-NNE: Petition for
9 Authority to Disconnect Global NAPs.
(Prehearing conference)

10
11 PRESENT: Chairman Thomas B. Getz, Presiding
Commissioner Clifton C. Below

12
13 Sandy Deno, Clerk

14 APPEARANCES: Reptg. Northern New England Telephone
Operations, LLC d/b/a FairPoint Comm.-NNE:
15 Frederick J. Coolbroth, Esq. (Devine...)
Sarah Davis, Esq.

16
17 Reptg. Hollis Telephone Co., Kearsarge
Telephone Co., Merrimack County Telephone,
and Wilton Telephone Co. (TDS Companies):
18 Paul J. Phillips, Esq. (Primmer, Piper...)

19 Reptg. Global NAPs:
Joel Davidow, Esq. (Kile, Goekjian, Reed...)
20 Lucy J. Karl, Esq. (Shaheen & Gordon)

21 Reptg. PUC Staff:
Lynn Fabrizio, Esq.

22
23 Court Reporter: Steven E. Patnaude, LCR No. 52

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P R O C E E D I N G

1
2 CHAIRMAN GETZ: Okay. Good morning,
3 everyone. We'll open the prehearing conference in Docket
4 DT 10-137. On May 14, 2010, FairPoint filed a motion for
5 authority to disconnect service to Global NAPs. FairPoint
6 states that call detail records show that from April 2008
7 through May 2010, Global NAPs had sent terminating traffic
8 to all exchanges served by FairPoint in New Hampshire, and
9 Global NAPs asserts -- or, FairPoint asserts that in
10 excess of \$4 million for traffic terminated by Global NAPs
11 in FairPoint exchanges is owed and due to the Company. On
12 May 25, Global NAPs filed its opposition and requested a
13 proceeding that includes discovery and an evidentiary
14 hearing.

15 We issued an order of notice on June 9
16 setting the prehearing conference for today, and also
17 directed Global NAPs to file certain information. I'll
18 note for the record that there have also been a series of
19 other documents filed in this proceeding to date, an
20 opposition by Global NAPs, and essentially a request for
21 discovery responses by FairPoint to that, to that request.

22 And, let me begin the hearing by -- or,
23 this prehearing conference by ruling that effectively the
24 motion for discovery is premature, and that we will

{DT 10-137} [Prehearing conference] {06-30-10}

1 conduct this prehearing conference in the normal course,
2 and take brief statements of the parties on their
3 positions. And, I expect then to transition into a
4 technical session, and we'll get a -- I guess the best
5 result would be a consensus on how to proceed. And, if
6 there's no consensus, then we'll deal with opposing
7 positions from the parties.

8 So, let's take appearances first, so I
9 understand who all is in the room, and then we'll go to
10 statements of positions.

11 MR. COOLBROTH: Good morning, Mr.
12 Chairman, Commissioner Below. On behalf of Northern New
13 England Telephone Operations LLC, doing business as
14 FairPoint Communications-NNE, I'm Frederick Coolbroth, of
15 the firm of Devine, Millimet & Branch, and my office is
16 here in Concord. With me today at counsel table are Sarah
17 Davis, Regulatory Counsel for the Company; Michael
18 Skrivan, who's the Company's Vice President for
19 Regulatory; and Kevin Shea, who's the Company's Vice
20 President for Government Affairs in New Hampshire.

21 CHAIRMAN GETZ: Okay. Good morning.

22 MR. PHILLIPS: Good morning, Chairman
23 Getz, Commissioner Below. I'm Paul Phillips, from the law
24 firm of Primmer, Piper, Eggleston & Cramer, in Montpelier,

1 Vermont. I'm here today on behalf of Hollis Telephone,
2 Kearsarge Telephone, Merrimack County Telephone, and
3 Wilton Telephone, which are all affiliates of TDS Telecom.
4 And, I'm joined by Tom Murray, who is the Manager of
5 External Relations for TDS Telecom.

6 CHAIRMAN GETZ: Good morning.

7 MR. DAVIDOW: Good morning. I'm Joel
8 Davidow, of the Kile Goekjian firm in Washington, and I'm
9 here as the lead counsel for Global, Global NAPs
10 companies. And, I'm accompanied by Lucy Karl, from the
11 Shaheen Gordon firm, our local counsel. Behind me are
12 four witnesses for the technical hearing: Leslie Berry,
13 who is President of an internet company, BroadVoice; Greg
14 Eccles, who is the President of an equipment company,
15 Convergent; Brad Masuret, who is the Operating Officer of
16 Global NAPs, Inc.; and, because of the technical hearing,
17 Dr. John Fike, of Texas A&M University, who is our expert.

18 CHAIRMAN GETZ: Okay. Good morning.

19 MR. COOLBROTH: Mr. Chairman, I would
20 just like to ask one clarifying question. Are those two
21 companies, the internet company and the equipment company,
22 affiliates of Global NAPs?

23 MR. DAVIDOW: They are.

24 MR. COOLBROTH: Thank you.

1 CHAIRMAN GETZ: And, Ms. Fabrizio.

2 MS. FABRIZIO: Good morning. Lynn
3 Fabrizio, today on behalf of Staff. And, with me at the
4 table today are Kate Bailey, Director of the Telecom
5 Division, Les Stachow and Jennifer Ducharme, analysts in
6 the Telecom Division. Thank you.

7 CHAIRMAN GETZ: Okay. Good morning.
8 Well, let's start with Mr. Coolbroth.

9 MR. COOLBROTH: Thank you, Mr. Chairman.
10 On November 10th, 2009, this Commission issued its Order
11 Number 25,043 in Docket DT 08-028. In that order, which
12 was later affirmed on rehearing and not appealed by Global
13 NAPs, the Commission found that Global NAPs had violated
14 the Commission's rules by failing to pay the tariffed
15 access charges of the TDS Companies. The Commission held
16 not only that the TDS Companies could discontinue their
17 services to Global NAPs, but that also it was in the
18 public interest for the intervening local exchange
19 carriers to also discontinue services to Global NAPs.
20 Accordingly, FairPoint filed its motion in DT 08-028, on
21 the basis that its switched access charges claims against
22 Global NAPs were essentially identical to those of the TDS
23 Companies and requesting authority to discontinue service
24 to Global NAPs. Global NAPs opposed this motion, and the

1 Commission initiated this proceeding.

2 FairPoint respectfully suggests that
3 this proceeding should be concluded promptly because,
4 after stripping away the extraneous arguments, the essence
5 of Global NAPs' defense is identical to the one in the TDS
6 proceeding. Consequently, the Commission can accept the
7 record of the TDS proceeding without further
8 investigation. In fact, not only is all of the switched
9 access traffic at issue of the same type as in the TDS
10 proceeding, in fact, some of it is the same traffic as in
11 the TDS proceeding, since all of the TDS exchange access
12 traffic is routed through the FairPoint tandem.

13 In docket DT 08-028, despite ample
14 opportunity, and remarkable indulgence by this Commission,
15 and a Commission mandate, Global NAPs never produced
16 evidence that the traffic was anything other than access
17 traffic subject to switched access charges. Moreover, the
18 so-called "new" evidence that it has proffered, consisting
19 of references to decisions in unrelated cases from other
20 jurisdictions has already been acknowledged and rejected
21 by the Commission in its order on rehearing. They cite
22 cases, cited cases then and now all over the country, with
23 the exception of the First Circuit, presumably because
24 under two of the decisions involving Global NAPs and

1 Verizon at the First Circuit, the Global NAPs so-called
2 "ESP exemption" argument is dead on arrival in this
3 Circuit.

4 For reasons that I will describe more
5 fully below, to the extent that Global NAPs is attempting
6 to turn this access charge case into one in which the
7 Commission would be asked to enforce an interconnection
8 agreement between FairPoint and Global NAPs, FairPoint
9 respectfully reserves its right to challenge the
10 Commission's jurisdiction over such an enforcement
11 proceeding relating to the interconnection agreement.
12 And, I'll get to in a minute what the basis for that
13 reservation in rights is.

14 As the Commission considers the plethora
15 of arguments raised by Global NAPs, we ask you to consider
16 three things. First, scrutinize carefully what they tell
17 you, because, based on the past conduct of Global NAPs,
18 you have good reason to suspect that it may not be true.
19 Second, please be aware of what they don't tell you,
20 because they have a knack of leaving out material factors.
21 And, finally, please remember the two words that they do
22 not seem to want you to hear, "First Circuit".

23 In that regard, we ask the Commission to
24 review the fifth and latest decision of the First Circuit

1 litigation between Verizon and Global NAPs issued on
2 April 29, 2010. And, I have a slip opinion available, if
3 the case is unavailable to the Commission. You'll find in
4 that case findings that Global NAPs played fast and loose
5 with the courts, presented witness -- witnesses who simply
6 lied in sworn testimony. You'll also see a shocking and
7 bizarre story of willful concealment and destruction of
8 evidence.

9 CHAIRMAN GETZ: Mr. Coolbroth, is that
10 actual language or is that your characterization?

11 MR. COOLBROTH: Well, I can provide the
12 language. If I may, I have copies of the decision.

13 (Atty. Coolbroth distributing documents
14 to the Bench.)

15 CHAIRMAN GETZ: Okay. Please continue.

16 MR. COOLBROTH: On Page, which this is a
17 lowest law version, but, so, the upper right-hand corner
18 the page labeled "19 of 26" -- I'm sorry. I'm sorry,
19 starting on "16 of 26", which is contained within Page 36
20 of the slip opinion, is the paragraph: "There is no doubt
21 that Global NAPs deliberately played fast and loose with
22 the courts in an effort to gain an unfair advantage."
23 That's one quote.

24 CHAIRMAN GETZ: Okay. We don't need to

1 go further through the order, just continue with your
2 statement.

3 MR. COOLBROTH: In turning to the
4 arguments raised here, Global NAPs first asserts that this
5 Commission is legally prohibited from allowing FairPoint
6 to terminate intrastate access service, because doing so
7 would have the effect of terminating interstate access
8 services, over which the court -- this Commission has no
9 jurisdiction. Thus, although Global NAPs later says in
10 its opposition that this Commission has exclusive
11 jurisdiction, it opens with the assertion that the
12 Commission is powerless to grant the requested relief. In
13 any event, this issue is of no moment to the Commission,
14 since FairPoint has given all necessary notifications
15 under federal tariffs and its interconnection agreement to
16 terminate interstate services. FairPoint is prepared and
17 legally entitled to do so immediately. We would expect
18 that, if we take action with respect to interstate
19 services, Global NAPs will then complain that doing so is
20 prohibited, because it would interfere with their
21 provision of intrastate services. This would be a typical
22 Global NAPs "Catch 22".

23 Global NAPs then points to three basic
24 theories why FairPoint cannot disconnect Global NAPs, and

1 it instead must continue with the Global NAPs free ride.
2 First, they say that this traffic is not governed by the
3 access tariff at all, but instead by the New Hampshire
4 interconnection agreement between Verizon and Global NAPs
5 that has been assumed by FairPoint. Then, they say that,
6 because the definition of "internet traffic" contained in
7 the interconnection agreement, because of that definition,
8 access charges do not apply at all to traffic which
9 touches the internet at any point during the transmission.
10 What they don't tell you is that exactly the same language
11 is contained in the Massachusetts interconnection
12 agreement between Global NAPs and Verizon that resulted in
13 a \$57 million judgment in favor of Verizon for access
14 charges for interexchange internet bound traffic. This
15 decision culminates seven years of litigation, including
16 five appeals to the First Circuit. If the interconnection
17 agreement were subject to the sweeping interpretation
18 urged by Global NAPs, Verizon would not be owed
19 \$57 million. Well, it is, and FairPoint's owed 4 million.

20 Second, Global NAPs says that, before
21 FairPoint can terminate service to Global NAPs, FairPoint
22 is required by federal law to come before this Commission
23 for approval. And, Global NAPs cites as authority for
24 this proposition the Third Circuit case of Core

1 Communications. Scrutinize what they tell you, beware of
2 what they don't tell you, and remember the First Circuit.
3 The Core Communications case says no such thing. What
4 that case does do is announce a rule that's applicable in
5 the Third Circuit that litigated interconnection agreement
6 disputes must be heard in the first instance by the
7 relevant state commission. FairPoint is not asking this
8 Commission to enforce its interconnection agreement. The
9 Core Communications case is inapplicable.

10 Moreover, in its April 29, 2010
11 decision, which I've handed up, the First Circuit
12 expressly rejected the notion of exclusive initial
13 enforcement jurisdiction as being with the PUC. Core
14 Communications is not good law in this Circuit. Global
15 NAPs didn't tell you that, even though I'm sure they are
16 very familiar with this case. In fact, the First Circuit
17 noted that it had not decided whether a state PUC has any
18 jurisdiction at all to enforce an interconnection
19 agreement. Please see that slip opinion, the slip opinion
20 Pages 21 to 22. If there is such jurisdiction, which we
21 do not concede, it certainly is not exclusive. And, it's
22 because of that case that we have reserved our rights on
23 the jurisdiction question.

24 Third, Global NAPs says that they have

1 offered to pay 0.045 cents per minute for traffic for
2 which the applicable access charge rate is around 2.8
3 cents per minute, less than 2 percent of the applicable
4 price. There is no tariff, agreement, law or regulation
5 applicable to the relationship between FairPoint and
6 Global NAPs that conforms in any way to the amount
7 proposed by Global NAPs. And, of course, I would point
8 out that Global NAPs has not even paid that amount.

9 In fact, it's important to emphasize
10 that Global NAPs has never paid a cent to FairPoint in New
11 Hampshire for any services since FairPoint acquired these
12 properties, and now owes over \$4 million. Apart from
13 switched access charges, there are interstate special
14 access charges that are almost \$40,000 per month for
15 interconnection trunks that Global NAPs leases from
16 FairPoint. These charges are now \$950,000 past due.
17 Reserving FairPoint's jurisdictional argument regarding
18 enforcement of the interconnection agreement, we also
19 point out that Global NAPs has failed to pay collocation
20 charges, which amount to \$3,400 a month, and now total
21 \$80,000, which are past due. Global NAPs has never
22 disputed these amounts. Global NAPs has also not paid for
23 interoffice facility unbundled network elements. They
24 have paid nothing at all.

1 Global NAPs would have the free ride
2 continue while they embark on a new legal odyssey. They
3 played this game with Verizon for seven years and now owe
4 \$57 million, that Verizon likely will never collect.
5 Global NAPs and its affiliates have been placed in
6 receivership for the benefit of Verizon and Southern New
7 England Telephone, that produces the ironic result that
8 any benefit derived from these proceedings would inure to
9 the benefit of Verizon and Southern New England Telephone.
10 FairPoint is highly unlikely to collect anything from
11 Global NAPs after this litigation. With this in mind,
12 FairPoint has issued a formal demand for financial
13 assurances in accordance with the interconnection
14 agreement between the parties.

15 In its Order in the TDS proceeding,
16 under factual and legal circumstances identical to those
17 in this proceeding, the Commission determined that Global
18 NAPs had violated the Commission's rules. It recognized
19 that Global NAPs was unfairly shifting its costs onto
20 local exchange carriers at the expense of ratepayers of
21 New Hampshire, and to the detriment of competitors who
22 honor their payment obligation. It then found that it was
23 in the public interest for local exchange carriers to
24 disconnect services to Global NAPs. We believe that the

1 same is true here. Thank you.

2 CHAIRMAN GETZ: Thank you.

3 Mr. Phillips.

4 MR. PHILLIPS: Thank you, Mr. Chairman
5 and Mr. Commissioner. The TDS Companies in New Hampshire
6 were the Petitioners in DT 08-028, and were the prevailing
7 parties in both the November 10th, 2009 final order, Order
8 Number 25,043, as well as in the April 2nd, 2010 order
9 denying reconsideration, Order Number 25,088. As the
10 factual record in that case showed, however, TDS is unable
11 to enforce its authority to block the Global NAPs traffic
12 in New Hampshire without the cooperation of FairPoint.
13 And, so, our interest in this case is in getting some
14 assurance that, notwithstanding the opening of this case
15 and the questions that have been raised about FairPoint's
16 authority to act, FairPoint will nonetheless be able to
17 assist TDS in enforcing the Commission's lawful orders,
18 which have not been appealed and which became final.

19 On May 26, the TDS Companies in New
20 Hampshire filed the letter supporting the FairPoint motion
21 for disconnection, on the basis that the Commission's
22 order of April the 2nd, in our view, was quite clear that
23 there was not a need to petition the Commission for
24 authority to disconnect Global NAPs under circumstances --

1 under any of the circumstances, either those that TDS has
2 found to be applicable to them or the ones that FairPoint
3 has annunciated. And, on Page 20 of the April 2nd order,
4 the Commission was quite clear. It said "The rules do not
5 require any action by this Commission prior to a utility
6 disconnecting service under any of the delineated
7 circumstances." In this case, in fact, TDS was not
8 required to petition the Commission for authority to cease
9 allowing Global NAPs's traffic to terminate on its
10 network.

11 And, so, in our view, the circumstances
12 that FairPoint finds itself in are quite similar to those
13 of TDS. Namely, that they have a business customer,
14 Global NAPs, who has not paid a penny for any of the
15 services that FairPoint has provided. And, so, whether
16 that happens under a tariff, as in the TDS case, or under
17 FairPoint tariffs or under an interconnection agreement,
18 the issue is the same. That a user of services in New
19 Hampshire is obligated to pay for the use of those
20 services. And, when a customer has paid nothing, the
21 utility is entitled to disconnect.

22 And, so, in our view, we would want to
23 see that happen in FairPoint's case as quickly as
24 possible, to remove any cloud of doubt as to FairPoint's

1 ability to assist TDS in enforcing the orders that we have
2 as well. Thank you.

3 CHAIRMAN GETZ: Okay. Thank you.
4 Mr. Davidow.

5 MR. DAVIDOW: Thank you. I might start
6 with a small word of nostalgia from personal background.
7 In 1973, my employer, the Antitrust Division of the
8 Justice Department, asked me to go in front of the FCC and
9 support deregulation of the telephone business in a
10 petition by MCI to offer microwave telephone inexpensive
11 service from Chicago to St. Louis and break the AT&T
12 monopoly. I was successful in that argument. And, at
13 that point, the NARUC, the National Association of
14 Regulatory Utility Commissioners, concluded that they were
15 very much disturbed by the idea of breaking the AT&T
16 monopoly and having new, cheaper technologies. And, so,
17 they appealed to the Ninth Circuit Court of Appeals. The
18 Attorney General asked me to go out to San Francisco and
19 defend the FCC decision. I did that successfully. About
20 a year later, MCI came in, asked to see me, and said that,
21 "now that they were trying to interconnect with a Bell
22 Company, they're trying to live within was a living hell,
23 and that they were abusing their monopoly power, and would
24 I be willing to recommend an antitrust investigation of

1 AT&T?" I wrote such a memo; the investigation occurred.
2 And, a few years later my deputy wrote the decree that
3 broke up the Bell System and became the permanent decree,
4 until it was replaced by the 1996 Act, which created the
5 statutory duty on companies like FairPoint to
6 interconnect.

7 But one of our positions has been that
8 the achievement of the 1996 Act would be eviscerated if a
9 company, which is required to deal with this, waits a
10 little while and sends us a bill that's 40 times too high,
11 and then says "and, if you don't pay it, we don't need
12 anyone's permission, we just cut you off. Because, in our
13 judgment, it's the right bill. And, we don't need to
14 adjudicate whether it's the right bill or not." And, our
15 position, which is supported by the Third Circuit, and not
16 relevant to the First Circuit, as I'll get to in a moment,
17 was that, obviously, the Act can only mean that, if you --
18 once you've been compelled to sign an interconnection
19 agreement, and you're using a disputed bill as the reason
20 to give up or to get around or abrogate your federal duty,
21 then you have to win. You have to proof that your bill is
22 right. And, the bill has to be right under the ICA.

23 And, by the way, going to the difference
24 between the First and the Third Circuit, all the First

1 Circuit said, and you certainly have the opinion in front
2 of you, was that, in Core, there was an absolute mandate
3 that all disputes had to be won first in the state
4 commission. And that, in the First Circuit, they viewed
5 it as a "waivable right of exhaustion of remedies", that
6 was their phrase. In other words, the law of the First
7 Circuit is that FairPoint has to exhaust its remedies,
8 unless there's some reason why that issue has been waived.
9 And, the waiver in the Verizon case, their alleged waiver,
10 was that Global waited two years into a district court
11 action before suggesting that the matter should have been
12 taken first to the state commission. So, the waiver of
13 the exhaustion remedy was being tardy.

14 Now, we are not tardy here. When we got
15 the notice to cut us off, we promptly came here. So,
16 there is no question of our waiving the right. And, the
17 First Circuit clearly says "there must be an exhaustion of
18 remedies."

19 Let me turn for a moment to the rest of
20 that First Circuit opinion. There are two points about
21 it, very simple, it's just not the same case. The first
22 is, Global has two businesses; dial-up internet, in which
23 it sends calls from somewhere in Massachusetts and New
24 Hampshire to the internet, and VoIP, in which it sends

1 calls from the internet to New Hampshire or Massachusetts.
2 The sole issue in the \$57 million case concern Global's
3 2003 to 2005 dial-up internet business, traffic leaving
4 Massachusetts. The argument in that case was that, as it
5 passed from Springfield to Global's headquarters in
6 Quincy, and onto Reston, Virginia, that segment should be
7 viewed as an instate long distance call subject to a
8 tariff, to a charge analogous to the charge for that long
9 distance carriage. That was disputed by Global on the
10 ground that the FCC had said that "there is no such thing
11 as an instate segment of a call, that they're
12 jurisdictionally interstate." That was lost in the First
13 Circuit, though it was won against NARUC in the DC Circuit
14 in January of this year, and that Global would have the
15 right to take the First Circuit opinion to the Supreme
16 Court of the United States, citing the conflict in the
17 circuits between the Core/NARUC case in DC and so on.

18 The remaining point has to do with the
19 bitter fight about Global's discovery abuses. I should
20 note, there is no case that I know of, and I'm familiar
21 with 30 Global cases involving VoIP, in which anybody said
22 that Global hid any evidence concerning the technical
23 nature of its traffic. The dispute that arose in the
24 First Circuit had to do with its finances. That is, once

1 there was a question of it being owed 57 million, the
2 question is "which of its companies had that much money?"
3 And, there was a broken computer and records that didn't
4 exist, it was a one man owned company. And, there were
5 then a series of disputes and findings against Global,
6 saying that "the way it kept its financial records was
7 unacceptable", and so on.

8 So, the entire issue of Global's
9 credibility had nothing to do with its credibility about
10 the nature of its service. It had to do with the
11 credibility of its explanations as to why it did not have
12 particularly good information on its bank accounts. An
13 issue which is presently not here. To the extent we're
14 going here to the issues we see as relevant, the issue
15 will be the credibility regarding the internet nature of
16 our service.

17 I should note that FairPoint's lawyer
18 glossed over what he said were totally irrelevant cases,
19 but that strikes me as odd. Because, in various state
20 commissions, there's been a large issue about whether
21 Global has produced hearsay, as opposed to direct
22 evidence. Well, in September, we tried -- I tried a case
23 in front of a very tough District Judge, Judge Jed Rakoff,
24 in the Southern District. It was a case in which, as

1 here, the ostensible point was to collect tariffs. And,
2 our argument was that our traffic was all internet.
3 Vonage appeared, which is a well known internet company,
4 testified under oath in open court. Transcom appeared,
5 and as did the witnesses we have here. Judge Rakoff
6 concluded that our witnesses were entirely credible, and
7 made a finding that we were a nomadic internet company.
8 He concluded at the end, going against three other
9 precedents, that he could use the adoption of unjust
10 enrichment to cause us to pay half of what was otherwise
11 owed.

12 We asked for reconsideration. In our
13 reconsideration we cited the testimony of Verizon in that
14 case. Because, in that case, the witness for Verizon
15 testified as follows: "That it is the policy of Verizon",
16 and he mentioned "AT&T" as well, "that if a company
17 represents to them that it is delivering a VoIP rather
18 than standard traffic to them, they accept that
19 representation, and having accepted, they mutually use a
20 figure of \$0.00045 as being the", for want of a better
21 word, "the standard industry negotiated rate for VoIP",
22 which goes back to the heart of this case. And, that is
23 that this is a case between two parties that have a
24 contract approved by this Commission. And, that that

1 contract states that it takes precedence over tariffs, it
2 states that the rates, if any, for traffic that comes to
3 or from the internet will be no higher than those rates
4 allowed by the Federal Communications Commission.

5 I note another federal case, which we
6 have cited before, and which is readable, which is Judge
7 Robertson's recent decision in *PAETEC versus CommPartners*.
8 In *PAETEC versus CommPartners*, PAETEC sued under tariffs
9 to impose them on VoIP traffic. And, Judge Robertson
10 said, first of all, that he was going to have to decide
11 the case on looking at the statute in that case, which
12 talks about traffic that's "unchanged in form or content".
13 And, he said the reason he had to is because "the FCC has
14 never set out a rate for VoIP." So, if Judge Robertson is
15 right, that "the FCC has never set out a rate for VoIP",
16 then, under the contract, which says "there's no way to
17 send us a bill for VoIP up to this point, because you
18 can't send us a bill for VoIP until the FCC creates a rate
19 for VoIP." There isn't any. That you're then left to a
20 negotiated rate. And, if you're going to have a
21 negotiated rate, you would want a nondiscriminatory rate,
22 which is why we believe that the rate charged by Verizon
23 is the nondiscriminatory, and it should also be a
24 cost-based rate.

1 The only other point I'd make is this
2 point about the "posting a bond". We have an oddity, you
3 know, the old phrase "the pot calling the kettle black."
4 Verizon, a very solvent company, put a provision in about
5 how, if Verizon suspected that you weren't totally
6 solvent, they could demand a bond. Well, FairPoint took
7 that over. But, of course, FairPoint is nowhere near as
8 solvent as Verizon. So, you now have FairPoint, which is
9 in Chapter 11, saying "oh, gee, it's really worried about
10 Global NAPs' finances." Well, obviously, Global NAP is
11 worried about FairPoint's finances. Global NAP has sent
12 various bills for reciprocal compensation to FairPoint;
13 FairPoint has never paid them.

14 In any event, the clause in question,
15 the amount of the bond goes back to the idea that "2.8
16 cents a minute is the right rate." Well, that's certainly
17 not an FCC rate. It's not a VoIP rate. That's a rate as
18 if our traffic were standard traffic. Well, creating a
19 bond based on their personal conception that our traffic
20 is something that it's not is neither here nor there.

21 Well, let me add something about what
22 Mr. Phillips said a moment ago. Global has decided not to
23 challenge the decision of the TDS parties, the various
24 local phone companies, that they don't want to deal with

1 it anymore. And, Global has a perfectly easy way to cut
2 off its traffic to them, by simply giving the phone
3 numbers to Global's subscribers. So, we can cooperate
4 with Mr. Phillips without the need for any help from
5 FairPoint. If they don't want to take any more of our
6 traffic, we've offered them the 0045 rate, we'll pay them
7 if they take the traffic. If they don't want the traffic,
8 then we can cooperate with them, and we don't need the
9 help from FairPoint to get them cut off. We've done it in
10 Pennsylvania, with Palmerton, which was an ICO that didn't
11 want to take any more traffic. And, we did -- we did
12 cause the traffic not to reach them anymore from us.

13 Let me say something about the people I
14 brought with me, because -- oh, other point about the bond
15 issue was, the bond issue was presented as if it was not
16 part of this hearing, but we don't see how it cannot be.
17 Because their contention was that it would be a basis for
18 cutting us off, this hearing is to determine whether they
19 have the right to cut us off. And, for them to create a
20 new demand, send it to us, and then immediately cut us off
21 without it becoming part of this hearing, seems to me
22 basically an end run around the hearing and its result.

23 You know, the other point I should make
24 on this, put simply is, if one is looking at the New York

1 PSC case called TFC -- TVC, the Maryland case, the ALJ
2 decision in Pennsylvania, the Rakoff case, and the PAETEC
3 case of our supplier, Global has had a very good record of
4 winning the VoIP cases. It's not a situation to say
5 "we're just a stubborn company that says we don't have to
6 pay for VoIP and never wins." We've won in very difficult
7 forums, with very sophisticated judges and commissioners.

8 Now, it's true that we can't get Vonage
9 to come up here to New Hampshire to testify, because they
10 won't, they're 100 miles from New York and we were able to
11 get them there, but they're not going to volunteer to take
12 their time, they're a big company, to come up and help us.
13 It would be nice if they would. The most we can do is we
14 can bring you their sworn testimony from New York, which
15 we have, and we see no reason to question.

16 In any event, the witnesses we have
17 today, we have Leslie Berry, who is an executive with
18 BroadVoice, which is another internet company; and Greg
19 Eccles, who is with Convergent, which is the company that
20 supplies the equipment that modifies the traffic, at least
21 at one segment of the traffic flow; Brad Masuret, who can
22 describe the various businesses of Global, Inc.; and
23 Dr. John Fike. I should say more than a minute about
24 Dr. Fike. Dr. Fike has a PhD in Telecommunications from

1 SMU. He has been an endowed professor of
2 telecommunications for more than 20 years at Texas A&M.
3 He's a Director of the Internet Lab, which is also on the
4 Texas A&M campus. He's the author of books on
5 understanding the internet. He was accepted as an expert
6 by the Pennsylvania ALJ, and his findings were accepted by
7 that ALJ. His findings that we were primarily a nomadic
8 VoIP company was accepted even by the full commission.
9 His findings that our traffic is enhanced was also
10 accepted, except that the commission there, and we can
11 discuss that later, felt that, as to that traffic of ours
12 which was enhanced, it wasn't enhanced enough to satisfy
13 the Pennsylvania Commission, though it was enhanced enough
14 to satisfy their ALJ.

15 So, anyway, these four witnesses I think
16 give us the opportunity to have a very informative
17 technical hearing. Let me go to one last point, which is
18 again to strike the clear difference between the question
19 before this Commission in the TDS case and the question
20 here. This Commission took the view that, had we been all
21 nomadic VoIP, we might have had a defense. But that some
22 of our traffic was -- did not begin, we didn't prove that
23 every or even that 99 percent of our traffic began in
24 Internet Protocol, began on somebody's computer or such.

1 And, that that was the only federally mandated defense
2 that the Commission was willing to consider.

3 And, this contract has a very different
4 piece of language. The contract says that the traffic is
5 immune if it touches the internet "at any point during the
6 duration of the call." That's the exact language of the
7 ICA you approved. Well, obviously, "at any point during
8 the duration" can be, to use a phrase that's used in the
9 industry "IP-in-the-middle", or whatever. Therefore, the
10 point is the technical inquiry, as we see it now, is
11 defined by the words of the ICA. It's defined by the
12 words "does Global's traffic touch the Internet "at any
13 point during the duration of the call"?" And, to go back
14 to that, it seems a funny point, but one has to visualize
15 it, we don't have a whiteboard right here. Is that, if
16 you have a call that starts in northern New Hampshire to
17 go to southern New Hampshire, and that call comes into
18 FairPoint with Global's OCN in it, in other words, it's a
19 call that generates a bill, the testimony has been, and
20 it's never been doubted, that Global gets all its traffic
21 from three companies that happen to be in Nevada and
22 Texas; Transcom, CommPartners, and UniPoint, or PointOne.
23 Which mean -- and, that those companies charge money for
24 the internet services they perform. They are internet

1 companies, they have websites and so on, and people deal
2 with them, people pay them. So, therefore, a call, which
3 goes to FairPoint, and has Global's name on it, must have
4 left New Hampshire, gone to Nevada, gone through whatever
5 process Transcom or others do, back to Global in Islip,
6 New York, up to Quincy, and back into FairPoint. In other
7 words, it circles the country through various internet
8 companies. If it didn't, Global's name wouldn't be on it.
9 Because Global never gets any traffic directly from
10 anyone; Global is a "subforward", if you want the name for
11 our business. We are a subwholesaler. So, we forward for
12 forwarders. That's all we do. And, those forwarders are
13 in Texas and Nevada, and they're in the business of
14 running traffic through things called "Veraz converters",
15 which I'm not technically capable of describing, but are
16 described in websites and in technical papers, and by
17 Dr. Fike.

18 That's it. I'll rest for now and take
19 any questions. And, obviously, be prepared to participate
20 actively in the technical hearing.

21 CHAIRMAN GETZ: Okay. Thank you.
22 Before we turn to Staff, I'd like to turn back to
23 Mr. Phillips. Mr. Phillips, do you have any response with
24 respect to Mr. Davidow's statement that "Global NAPs can

1 cooperate with TDS without help from FairPoint"?

2 MR. PHILLIPS: I would need to discuss
3 that situation with my client. I can say with some
4 certainty that, if the request is that TDS declare that
5 they don't want to receive further traffic from GNAPS, TDS
6 is willing to make that declaration. As to how that gets
7 accomplished, I would need to consult with the technical
8 folks at TDS.

9 MR. DAVIDOW: I can get a letter back to
10 this Commission in two days on the point.

11 CHAIRMAN GETZ: Well, perhaps that's
12 something, another issue that can be discussed offline in
13 the technical session or afterwards.

14 MR. DAVIDOW: Uh-huh.

15 CHAIRMAN GETZ: Okay. All right.
16 Ms. Fabrizio.

17 MS. FABRIZIO: Thank you, Mr. Chairman.
18 There are a number of issues involved in this case that we
19 look forward to fleshing out and examining through the
20 normal course of discovery and technical sessions in an
21 expedited manner. In the meantime, Staff notes that
22 neither Global NAPs, Inc., nor any of its three affiliates
23 registered to do business in New Hampshire, Global NAPs
24 Networks, Inc., Global NAPs New Hampshire, Inc., and

1 Global NAPs Realty, Inc., are currently in good standing
2 with the New Hampshire Secretary of State as of this
3 morning, according to the Secretary of State's website.
4 And, while Global NAPs's receiver, as appointed by the
5 First Circuit Court, paid a past due assessment invoice
6 under RSA 363-A this week for revenue earned in 2007, the
7 Company has failed to file annual reports with this
8 Commission for the years 2008 and 2009. And, I would note
9 that the only reason they filed reports for 2005, '06, and
10 '07 was because the Commission ordered it to do so in
11 Order Number 24,907, on October 17th, 2008.

12 Global NAPs is registered to do business
13 as a CLEC in New Hampshire. Failure to file annual
14 reports is a violation of Commission Rules 431.09 and
15 431.10. If Global NAPs is doing business in the state as
16 a CLEC, it presumably owes assessment amounts for those
17 years as well. Global NAPs has repeatedly stated that it
18 has no end-user customers here in New Hampshire. And,
19 with no end-user customers, it does meet the requirements
20 for CLEC registration, nor is a nomadic VoIP company or a
21 forwarder for forwarders a CLEC.

22 Staff recommends that Global NAPs be
23 required to come up to date on its annual report filings
24 with the Commission and obtain good standing with the

1 Secretary of State within the week.

2 However, due to the length of the
3 dispute we are hearing about today between FairPoint and
4 Global NAPs, Staff urges the Commission to require an
5 expedited schedule in this proceeding, notwithstanding the
6 pending violations under Commission rules and state
7 certification requirements. Staff thinks the issues are
8 already fairly well fleshed out in the various pleadings
9 that have been filed thus far, and that discovery can
10 therefore be conducted expeditiously. We urge the
11 Commission not to humor any procedural tactics that draw
12 the proceeding out more than necessary, in the interest of
13 New Hampshire ratepayers, as well as FairPoint and its
14 customers.

15 The Commission found, in Docket Number
16 DT 08-028, that no carrier has the right to use another
17 carrier's facilities for free. The only difference
18 between this case and the one in that underlying docket is
19 that an interconnection agreement exists between these
20 parties.

21 It should be noted further that Global
22 NAPs currently has 440,000 New Hampshire telephone
23 numbers, which it claims are fully assigned. The
24 Commission should require Global NAPs to immediately

1 identify the entity to which each number is assigned, to
2 ensure -- to enable the Commission to ensure that minimal
3 impact on any New Hampshire customer who may be using one
4 of these numbers will result from this proceeding. Thank
5 you.

6 CHAIRMAN GETZ: Can you repeat that
7 number, how many were assigned?

8 MS. FABRIZIO: 440,000. That represents
9 44 number codes.

10 CHAIRMAN GETZ: Was that everything,
11 Ms. Fabrizio?

12 MS. FABRIZIO: Yes. Thank you.

13 CHAIRMAN GETZ: Mr. Davidow, can you
14 respond to I guess the first two points, that if you have
15 any information on this, that Ms. Fabrizio's statements
16 that "the Company is not in good standing with the
17 Secretary of State" and that "the annual reports for '08
18 and '09 have not been filed"?

19 MR. DAVIDOW: I believe that this came
20 up in Pennsylvania, and we brought it up to date, and the
21 issue was satisfied, and I'm happy to satisfy it within a
22 week. You have 00 Global NAPs makes its money because a
23 company in Texas, let's say, Transcom, pays Global NAP for
24 a session to forward its traffic from, let's say, Quincy

1 and here. Therefore, Global makes no money in New
2 Hampshire. And, the way the thing reads is they want to
3 know whether we made any money in New Hampshire, and the
4 answer is zero. But we can file a form that says that.
5 Once we explain that to the Pennsylvania Commission, they
6 accepted it. But we did give them the actual thing
7 explaining it and putting the zeros in.

8 CHAIRMAN GETZ: Okay. All right. Thank
9 you.

10 CMSR. BELOW: Well, just to clarify,
11 Mr. Davidow. Are the four companies that are registered
12 as CLECs in New Hampshire, do you consider them to be
13 CLECs?

14 MR. DAVIDOW: This is going a little
15 federal. There's a case called "Time Warner", where MCI
16 was delivering VoIP traffic. And, there was an effort by
17 two states to say "we don't have to bargain with them and
18 they don't get to interconnect, because they're not true
19 CLECs. They're mere forwarders." And, the FCC, I believe
20 in the Time Warner case, says "they have the same rights
21 as a CLEC." So, the answer is, you don't have a form in
22 New Hampshire for somebody who is a forwarder for a CLEC.
23 But the Feds have made pretty clear that you wouldn't want
24 to keep people out of the state or say they can't use

1 their federal rights because they are less than a CLEC. I
2 mean, we're in the telecommunications business. We're
3 delivering the same kind of traffic that more standard
4 CLECs do, but we don't have all the attributes.

5 CMSR. BELOW: But the companies are
6 registered as CLECs?

7 MR. DAVIDOW: We have no choice. In
8 order to -- in order to interconnect, as happened, the
9 only way to do it is to register. And, we try to describe
10 our business as accurately as we can. Well, let me go
11 backwards. I believe that, in our dial-up business, which
12 still exists, we are clearly a CLEC. We do have customers
13 in New Hampshire for dial-up, but they don't pay us. They
14 are the source of business, but the -- if we deliver a New
15 Hampshire call to EarthLink, EarthLink pays us, not the
16 customer. But they are dial-up people in New Hampshire.
17 But, I don't know, when -- we got into this in
18 Pennsylvania. At the day we signed the thing to start
19 with, we were only doing dial-up coming out of New
20 Hampshire. Then, that went down to being like 3 percent
21 of our business, because most people don't use dial-up
22 anymore, but in some small towns they still do.

23 So, I think you would have to look at
24 both businesses. And, I think we have a tiny amount,

1 Mr. Masuret can answer. Mr. Masuret, what was this other
2 business we do that makes us a CLEC, beside -- you talked
3 about it in Pennsylvania?

4 MR. MASURET: Yes. When Global NAPs
5 first became a CLEC, I would have to say 100 percent of
6 our business at the time, close to 100 percent of our
7 business, was providing services to Internet Service
8 Providers. So, you would have an Internet Service
9 Provider, such as EarthLink is a good example. So,
10 EarthLink would be, at the time it was MindSpring, so an
11 Atlanta company. So, we would provide New Hampshire phone
12 numbers to EarthLink, and EarthLink would then advertise
13 or publish the New Hampshire phone numbers, presumably in
14 New Hampshire, to attract dial-up subscribers. So, if you
15 were a New Hampshire person and you were looking for a
16 local phone number to dial, and you wanted to select
17 EarthLink, you would look at their coverage areas. And,
18 if you saw a phone number that was local to you, you would
19 view EarthLink as a good option, or you could, you could
20 look at them as a good option. And, so, if the New
21 Hampshire person dialed the New Hampshire telephone number
22 belonging or assigned to EarthLink in this case, you would
23 basically get onto EarthLink's system, and you would be a
24 customer of EarthLink's Internet Service Provider company.

1 So, Global NAPs was a CLEC in that fashion, in that we
2 took our phone numbers and assigned them to our customer
3 base, which was the Internet Service Provider, not the
4 actual customer of EarthLink in this example.

5 So, I think, I'm the Vice President of
6 Sales, but, from a revenue perspective, I believe
7 Mr. Davidow is trying to say in one way that our revenue
8 is generated from EarthLink in this case, the Atlanta
9 company, and not from the New Hampshire subscriber of
10 EarthLink, who is paying EarthLink \$30 a month, or
11 whatever it may be.

12 CHAIRMAN GETZ: Okay.

13 MS. FABRIZIO: Commissioner Below, --

14 MR. MASURET: And, that was our business
15 when we first became a CLEC. And, I don't know what year
16 it was. It was probably in the early 2000s, 2000, 2001,
17 '02, '03. And, then, the dial-up business started to
18 disappear and go away as broadband became more prevalent
19 and people didn't dial up as much, and they had a
20 broadband connection from a Verizon or a FairPoint, for
21 example, or the cable company.

22 CHAIRMAN GETZ: I think that's enough on
23 that issue.

24 MR. MASURET: Okay.

1 CHAIRMAN GETZ: Thank you.

2 CMSR. BELOW: Well, just to clarify,
3 Mr. Davidow. Do you concede that, as registered CLECs,
4 the four companies have an obligation to comply with the
5 CLEC rules, and thus file annual reports that are required
6 by those rules?

7 MR. DAVIDOW: We'll have those within a
8 week here.

9 MS. FABRIZIO: And, Commissioner Below,
10 may I clarify in response to your question. Actually,
11 only Global NAPs, Inc. is registered as a CLEC of the four
12 companies that are registered with the Secretary of State.

13 CHAIRMAN GETZ: Okay. Thank you.

14 MR. DAVIDOW: Yes. That would be the
15 one. We did them for Pennsylvania. I'm a little
16 surprised that it comes up this late, because, as I
17 understand it, Global NAPs was in front of this Commission
18 at least twice before this, and I don't remember the same
19 request being made, and I don't know quite why. I mean
20 that is, in my view, it would have been done had it been
21 requested earlier, but I don't remember.

22 MS. FABRIZIO: Excuse me, Commissioners.
23 The request was actually made in the underlying docket, DT
24 08-028. And, at the time the order went out from the

1 Commission, annual reports up through 2007 were due. We
2 assumed that the Company would continue to comply with the
3 rule pursuant to that action.

4 MR. DAVIDOW: Well, there seems to have
5 been the Company has been in a lot of litigation and a lot
6 of financial turmoil. I should note that CommPartners,
7 which is a supplier, and another major source of internet
8 competition, declared bankruptcy in Nevada District Court
9 about three weeks ago. So, although CommPartners won its
10 case against PAETEC, it won it posthumously, to some
11 extent. This is a pretty bitter fight.

12 CHAIRMAN GETZ: Okay. Opportunity to
13 respond, Mr. Coolbroth. And, if you weren't planning to
14 speak to this issue, I'd like to hear what you have to say
15 about the intersection of this case with the ICA.

16 MR. COOLBROTH: Thank you, Mr. Chairman.
17 First, if I might, with regard to the content of the First
18 Circuit's decision, both with respect to the jurisdiction
19 question, this theory that all the First Circuit case
20 talks about is that it's an issue of "exhaustion of
21 remedies". Please take a look at Pages 20 through 22 of
22 the slip opinion. And, so, I'm not quite sure which
23 lowest law pages that lines up to be. I think you will
24 find that's simply not the case.

1 With respect to financial records and
2 Global NAPs's misconduct, I ask you to read the case. I
3 think you'll find something much different from the story
4 that you were told.

5 With respect to any bills for reciprocal
6 compensation, I think you've heard from Global NAPs that
7 they don't have any customers here. And, so, I don't see
8 how there could be bills for reciprocal compensation, if
9 they say they're not in that business.

10 In earlier representations, Global NAPs
11 has told you that all of its traffic is VoIP. Now, they
12 seem to be telling you there's another business here that
13 constitutes the basis for them being a CLEC. Again, I ask
14 you to scrutinize what they tell you.

15 With respect to who has customer
16 relations, I guess I would really like to know whether
17 Global NAPs is representing today to this Commission that
18 Global NAPs, Inc., the registered CLEC, is the entity that
19 has the customer relationships? Is Global NAPs telling
20 you that? I think that there's been litigation elsewhere
21 that that's not the case.

22 With respect to the interconnection
23 agreement, again, we're reserving on the issue of
24 jurisdiction because of the First Circuit decision. We

1 say that that really changes nothing. That the --
2 basically, the interconnection agreement sends you into
3 the tariffs. There is no FCC decision that would provide
4 that the intraLATA access tariff is inapplicable in this
5 situation. That, basically, we are the same as the TDS
6 case.

7 If Global NAPs were correct about their
8 interpretation of that provision in the interconnection
9 agreement, for instance, they could order business lines
10 or residence lines from the Company for purposes of
11 terminating internet traffic. They could order lines for
12 customers to take and use to dial for dial-up IPPs, and
13 FairPoint would be unable to charge for the
14 business/residence access line, because the calls that are
15 going to travel over it would somehow get to the internet.
16 It is a spurious argument. So that we think that we are
17 back to the same issue that this is access traffic and
18 it's covered by the access tariff.

19 I guess one interesting question that
20 one might want to ask Global NAPs, do they take the
21 position that any traffic that they handle is intrastate
22 traffic? I think they're telling you that traffic moves
23 between states. That it's -- their position is that it's
24 all internet, and, therefore, jurisdictionally interstate.

1 Do they take the position that any of the traffic here is
2 intrastate that this Commission has any jurisdiction over?
3 That would be an interesting question. We say it is, but
4 it sounds to me like they're saying it isn't.

5 I think that's what we have to offer.
6 Thank you.

7 CHAIRMAN GETZ: Thank you.

8 (Chairman and Commissioner Below
9 conferring.)

10 CHAIRMAN GETZ: Mr. Davidow, do you have
11 a response to either of the two questions that I guess is
12 posed by Mr. Coolbroth? First, who has the customer?
13 And, then, lastly, is any -- what's your position, is any
14 traffic that you handle intrastate?

15 MR. DAVIDOW: All right. "Who has the
16 customer?" Well, I think that concerns itself with
17 whether they owe us reciprocal compensation. And, I think
18 the point is that, if, for instance, a FairPoint
19 subscriber wants to dial up earthling from some small
20 town, and we are the person who terminates it to
21 EarthLink, then, under reciprocal compensation, the
22 terminating carrier gets some money. Now, it used to be
23 the 2.8 cents, but that was capped at 0007 in the 2001 ISP
24 Remand Order. So, our bills are capped at 0007, a

1 courtesy which was not extended to us by FairPoint when
2 the traffic went the other way.

3 I recall, in the -- of course, when we
4 did Pennsylvania, and we had a hearing with live
5 witnesses, which did not happen in New Hampshire, despite
6 protest by me at least, we -- let's say, they said "well,
7 here's an intrastate call from Allentown to here, and the
8 carrier is PAETEC. And, therefore, you owe us under the
9 intrastate tariff." So that we put PAETEC on the stand,
10 under oath, and said "this shows 77 calls from Allentown
11 to here, billed under the tariff as an intrastate rate.
12 "Did you make" -- "How many of those calls did you
13 actually make?" PAETEC said "None." "Well, why not?"
14 "Well, we're really in the business of selling telephone
15 numbers to Vonage. So, every one of those 77 numbers went
16 to Vonage." And, we said "well, where did they start once
17 you sold them to Vonage? Where was the person when he
18 made the call?" And, PAETEC said "we don't know, but we
19 do know that Vonage will sell you a Pennsylvania or a New
20 Hampshire number, whether you live there or not. They
21 don't care. They're called "virtual" telephone numbers."
22 Which is why the Federal Communications Commission held,
23 in holding that VoIP is jurisdictionally interstate, they
24 said "it's jurisdictionally interstate, because it might

1 or might not be local, and we don't know." When you have
2 companies that do two things. They, one, that it will
3 sell you a number wherever you live. You could have
4 numbers in five states, you want to carry five different
5 states around. And, secondly, they will give you a gizmo,
6 a little gadget, like MagicJack or whatever, you carry it
7 anywhere in the world, which means you can have moved from
8 New Hampshire to Singapore ten years ago, and every one of
9 your calls will be from Singapore, but, on the other hand,
10 every one will show up as an intrastate traffic.

11 Lastly, I should note that the FCC said,
12 in the ThirtyCall case, and the New York PSC said in the
13 TPC case, that there is a rule which said "if you started
14 a call in New Hampshire, and sent it to Texas, and back to
15 New Hampshire, that is an intrastate call, even though it
16 went all the way to Texas.

17 (Interruption by the court reporter.)

18 MR. DAVIDOW: That is an intrastate,
19 even though it went all the way to Texas.

20 CHAIRMAN GETZ: Well, let's be clear,
21 I'm not sure. Inter or intra?

22 MR. DAVIDOW: Intra. That a call that
23 begins in New Hampshire, goes to Texas, and then ends in
24 New Hampshire, assuming it physically did begin in New

1 Hampshire, is an intrastate call. Both the FCC in
2 ThriftyCall and the PSC said "if such a call, when it gets
3 to Texas, is converted in form or content by the use of IP
4 protocol means, the law is not clear whether it remains an
5 intrastate call." That is, the only decisions that hold a
6 New Hampshire to Texas to New Hampshire call are
7 intrastate are cases in which nothing happens to the call
8 except being forwarded.

9 So, where -- so, there are two problems
10 in saying whether it would -- I will add one third point
11 that's come up in a lot of the testimony, and that is, if
12 you had a person in New Hampshire, who wanted to call
13 somewhere else in New Hampshire, there are lines and
14 carriers, if you're a FairPoint subscriber and you want to
15 call somewhere else, you just send it. Well, but all
16 these calls are calls that ultimately got to New Hampshire
17 from Massachusetts through Global NAP, which meant
18 somebody didn't want to treat it as a local call. If they
19 wanted to treat it as a local call, they just would have
20 made it. Bing, bing, straight down the line. There are
21 lines between every city in New Hampshire. For some
22 reason, they wanted to pay somebody to take it to Texas,
23 and then back to Massachusetts, and then back.

24 CHAIRMAN GETZ: Is there anything

1 further before we close?

2 MR. DAVIDOW: Your Honor, I wanted to
3 say something about the word "jurisdiction". I remember,
4 I do teach law school, I'm afraid. And, when I teach
5 jurisdiction, there's at least four definitions, including
6 the jurisdiction to determine your own jurisdiction, which
7 becomes one of these lawyer semantic games. And, the
8 answer is, we brought this case to this Commission for
9 this relief at this point. We're not contesting, and
10 regardless of the traffic, under federal law, you have
11 jurisdiction over this ICA. Nobody can contend you don't.
12 We don't contend you don't. They don't contend you don't.
13 This is an ICA your Commission approved. And, we take the
14 position, as I said, that whether you use an "exhaustion
15 of remedies" theory of the First Circuit or a "mandatory"
16 theory, the disputes that involve an interpretation of the
17 ICA must be exhausted, to use the First Circuit rule.
18 FairPoint must exhaust its remedies to this Commission
19 before it could do anything else. So, in that sense, the
20 "exhaustion of remedies" requirement and your jurisdiction
21 over the ICA.

22 Now, whether you have jurisdiction to
23 impose tariffs on jurisdictionally interstate traffic,
24 once you are looking at the interpretation, all state

1 commissions look at FCC rules and federal law to see
2 whether they have jurisdiction to impose charges on
3 certain kinds of traffic. So, the Commission has
4 jurisdiction to determine whether it has jurisdiction to
5 put a certain tariff on a certain piece of traffic.

6 That's the best I can do with this word
7 "jurisdiction" without becoming hopelessly confused.

8 CHAIRMAN GETZ: Okay. Ms. Fabrizio.

9 MS. FABRIZIO: Mr. Chairman, I'd just
10 like to follow up on your question to Mr. Davidow. And,
11 in his response, which, while very interesting, I'm not
12 sure I heard a response to your question as to whether
13 Global NAPs, Inc., has any end-user customers in New
14 Hampshire? I think it would be helpful to have a "yes" or
15 "no" answer to that for today's discussion.

16 MR. DAVIDOW: No. Brad?

17 MR. MASURET: Yes. I do not believe
18 that we have any end-user customers in New Hampshire. I'd
19 like to double check. But, off the top of my head, the
20 answer is, you know, 99 percent of our revenue I know does
21 not -- does not come from anybody in New Hampshire. I'll
22 check the list, but I don't believe it is.

23 CHAIRMAN GETZ: That's something that
24 can be followed up in the technical session.

1 MR. MASURET: Okay.

2 MR. DAVIDOW: Yes. And, from what I
3 remember, the answer is "no". We don't have any.

4 CHAIRMAN GETZ: Okay. Mr. Coolbroth,
5 under our rules for a prehearing conference, Petitioner
6 has the last opportunity to speak. Do you have anything
7 further?

8 MR. COOLBROTH: Mr. Chairman, just one
9 other. My second question, about "whether it's Global
10 NAPS's position that any of its traffic is intrastate
11 subject to the jurisdiction of this Commission?"
12 Notwithstanding the long response by Mr. Davidow, I don't
13 think that they have answered that question. I think what
14 they told you is that at least it's mixed so that it's
15 interstate, and that everything that they provide is
16 interstate, I think is what their position is. We
17 disagree with it. But I think that's what they're telling
18 you their position is.

19 CHAIRMAN GETZ: Well, let's do this
20 then. I mean, if there is some statement that can be
21 agreed to or if there are different statements, typically,
22 coming out of technical session, there's going to be a
23 report. So, just if we can include an answer to that one
24 way or the other, that would be helpful. So, I think --

1 Mr. Davidow?

2 MR. DAVIDOW: There's one point that you
3 made that I didn't respond to, which is the suggestion
4 about speed. I will recall that, in asking for this
5 hearing, I suggested that it could be completed in one or
6 two days or three days. I think my point here is that, we
7 take the view that the contract on its face says that, if
8 the bills are for access and our traffic touches the
9 internet, they don't apply, and they have to start over
10 with the billing. The contract, you can read it, and you
11 will determine what it means. You're the ones who
12 approved it, you have the jurisdiction to interpret it.
13 The remaining question is "whether our traffic touches the
14 internet?" By the time we leave here today, I think we'll
15 know the answer to that question. And, therefore, as far
16 as I'm concerned, other than briefing, this is the
17 hearing. It can be called a "prehearing" or a "technical
18 hearing". But our argument only has two parts: The
19 contract means what it says, and we where what we are.
20 And, when we're done, if they want more days, they'll tell
21 you. Obviously, they have a right to drag it out as long
22 as they want. But, if there's any theory about my
23 dragging out anything, I'm here to finish.

24 CHAIRMAN GETZ: Mr. Coolbroth.

1 MR. COOLBROTH: So, Global NAPs is
2 waiving an evidentiary hearing with respect to the request
3 by FairPoint to terminate switched access charges --
4 services?

5 MR. DAVIDOW: Well, I'm saying that this
6 Commission is the finder of fact. Technically, in this
7 proceeding, my witnesses are not under oath. If you --

8 CHAIRMAN GETZ: "This proceeding",
9 meaning this prehearing conference today?

10 MR. DAVIDOW: Well, in this technical
11 session, as I understand the rules of a technical session,
12 they're not under oath. You, as the Commission, can
13 decide that you choose to find their evidence persuasive
14 anyway. Obviously, --

15 CHAIRMAN GETZ: Well, maybe there's some
16 confusion about this. We won't be present at a technical
17 session.

18 MR. DAVIDOW: All right. But you will
19 get a report from your staff as to what they learned.
20 And, if you're satisfied that that report answers the
21 question of the nature of our traffic, as compared to the
22 words of the contract, you can stop then. If you're not
23 satisfied, we'll come back. I mean, we don't particularly
24 want to bring these four people back, and have them make

1 statements on a record. I mean, I'm prepared in the
2 technical session to ask them briefly whether they affirm
3 this, or I can submit declarations that everything they
4 said during the thing is that under penalty of perjury
5 it's true.

6 CHAIRMAN GETZ: Well, I guess there's a
7 few procedural devices available to us.

8 MR. DAVIDOW: Yes.

9 CHAIRMAN GETZ: It's either going to be
10 declarations, it could be Mr. Patnaude could stay and it
11 could proceed in the nature of a deposition or --

12 MR. DAVIDOW: Yes.

13 CHAIRMAN GETZ: -- and they could
14 testify under oath, or there could be a stipulation of
15 facts. I guess I don't have any preference --

16 MR. DAVIDOW: Well, I --

17 CHAIRMAN GETZ: So we get everything on
18 the record. I don't have any preference among the three.
19 But, if there is a way to do all this in an expedited way,
20 I think that's a positive result. And, Mr. Coolbroth or
21 Ms. Fabrizio or Mr. Phillips, you have any thoughts on
22 that? Or, I mean, we could just adjourn and you can work
23 it out among yourselves. So, --

24 MR. COOLBROTH: Perhaps it makes sense

1 just to adjourn.

2 CHAIRMAN GETZ: Anybody else on process?

3 (No verbal response)

4 CHAIRMAN GETZ: Okay. Any other issues
5 then?

6 (No verbal response)

7 CHAIRMAN GETZ: All right. Then, we'll
8 adjourn and close the prehearing conference. Give the
9 parties the opportunity to proceed in a technical session,
10 and we'll see where it goes. And, we'll look forward to
11 the report and try to move this as long as quickly as we
12 can to everyone's benefit. Thank you, everyone.

13 MR. COOLBROTH: Thank you.

14 (Whereupon the prehearing conference
15 ended at 11:22 a.m. and a technical
16 session was commenced thereafter.)

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